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Sexual Harassment and the Reasonable Woman Standard: Is It a Viable Solution?

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Sexual Harassment and the Reasonable Woman Standard: Is It a Viable Solution?

> We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women . . . . [A] gender conscious examination of sexual harassment enables women to participate in the workplace on equal footing with men.[1]

During the past several decades, millions of women have struggled to gain social acceptance and equality in the workplace. This struggle has centered upon and evolved around many important issues including, but not limited to, equal employment opportunity, opportunity for advancement, and maternity leave. Although these issues still remain prominent in the women's struggle for equality in the workplace today, resolving the problem of sexual harassment in the workplace has recently gained significant attention in this movement.[2]

The recent decisions of some courts to adopt explicit or implicit reasonable woman standards in determining sexual harassment claims may prove to be a promising development in the women's quest for social acceptance and equality in the workplace. This comment will first discuss the development of the two types of sexual harassment claims—*quid pro quo* sexual harassment and *hostile environment* sexual harassment. As part of this discussion, this comment will examine the courts' ineffectiveness in adjudicating the hostile environment sexual harassment claim. Next, the comment will focus upon the Ninth Circuit Court of Appeals' decision to adopt an explicit reasonable woman standard in adjudicating the hostile environment sexual harassment claim. As part of this discussion, the comment will also identify other courts which have

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1. The United States Court of Appeals for the Ninth Circuit in *Ellison v Brady*, 924 F2d 872, 879 (9th Cir 1991). See notes 48-55 and the accompanying text for a discussion of *Ellison*.

2. Fifty-three percent of working women report experiencing conduct which *they* would describe as sexual harassment. Barbara A. Gutek, *Sex and the Workplace*, 47-48 (Jossey-Bass, Inc., 1985) (emphasis added). This finding merely means that an individual woman would find the conduct to be harassment; not that the conduct meets the legal standard for harassment. Gutek, *Sex and the Workplace* at 47-48.

adopted implicit reasonable woman standards in adjudicating hostile environment sexual harassment claims. Finally, the viability of using a reasonable woman standard and its influence in enabling women to participate in the workplace on equal footing will be addressed.

I. What Is Sexual Harassment?

Although sexual harassment encompasses many types of conduct, a sexual harassment claim will generally fall into one of two broad categories. The first is *quid pro quo* sexual harassment. Quid pro quo sexual harassment is the traditional and most obvious form of sexual harassment in that it generally involves "the exchange of employment benefits by a supervisor or employer for sexual favors from a subordinate employee."[3] Generally, the perpetrators of this form of sexual harassment are employers or supervisors since they have the power to withhold economic benefits or prevent advancement. As such, the effect of quid pro quo sexual harassment is generally tangible economic loss (or gain).[4]

The second category of sexual harassment is *hostile environment* sexual harassment. Hostile environment sexual harassment is the more recently recognized form of sexual harassment. Furthermore, because this type of sexual harassment is the less perceptible and/or detectible form of sexual harassment, it tends to be the more pervasive form of sexual harassment in today's workplace. Unlike quid pro quo sexual harassment, in which a tangible deal is struck for employment benefits, in hostile environment sexual harassment the day-to-day working environment is infested with verbal or physical abuses which challenge the intangible psychological well-being of the workers.[5] This type of harassment may range from sexual touching or demands, to sexual comments and epithets, to the mere circulation of pornography.[6] To fully understand

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3. Alba Conte, *Sexual Harassment in the Workplace: Law and Practice* § 2.2 at 15 (John Wiley & Sons, Inc., 1990).

4. Tangible economic loss may include termination, transfer, delay or denial of employment benefits, or adverse work performance evaluations. Conte, *Sexual Harassment in the Workplace: Law and Practice* § 2.2 at 16. This loss may occur in various ways: (1) benefits may be withheld from an employee until she submits to sexual demands; (2) an employer or supervisor may retaliate against an employee who has refused sexual advances by firing her or altering or withholding tangible job benefits; and (3) an employee may submit to an advance and still not receive the job benefit. Id.

5. Id at 15-17 (cited in note 3).

6. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand L Rev 1183, 1198 (1989).

the courts' treatment of the two types of sexual harassment a brief examination of the history and development of the sexual harassment claim is warranted.

II. The History of Sexual Harassment

Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Employment Act of 1972, ("Title VII"), made it an unlawful employment practice for an employer to discriminate on the basis of sex.[7] However, although the provisions of Title VII expressly prohibited various discriminatory conduct, the specific language of Title VII did not address the issue of whether sexual harassment constituted sexual discrimination within the title. As such, federal courts initially held that there was no cause of action under Title VII for sexual harassment.[8]

Williams v Saxbe was the first court to determine that sexual harassment was discriminatory conduct within the meaning of Title VII.[9] Significantly, this decision did not occur until more than

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7. 42 USC § 2000e-2(a) as amended provides:

§ 2000E-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, *sex*, or national origin.

42 USC § 2000e-2 (emphasis added).

8. The first four federal courts to adjudicate a sexual harassment claim held that it did not violate Title VII. See *Barnes v Train*, 13 FEP Cases 123 (D DC 1974); *Corne v Bausch & Lomb, Inc.*, 390 F Supp 161 (D Ariz 1975), vacated on procedural grounds, 562 F2d 55 (9th Cir 1977); *Tompkins v Public Service Electric & Gas Co.*, 422 F Supp 553 (D NJ 1976), rev'd, 568 F2d 1044 (3d Cir 1977); and *Miller v Bank of America*, 418 F Supp 233 (ND Cal 1976), rev'd, 600 F2d 211 (9th Cir 1979).

9. 413 F Supp 654 (D DC 1976), rev'd in part, vacated in part, 587 F2d 1240 (DC Cir 1978). In *Williams*, the plaintiff, a female, brought an action to recover damages for the defendant's alleged violations of the provisions of Title VII. *Williams*, 413 F Supp at 655. The plaintiff alleged that she had been denied equal employment opportunities because of her sex. Id. Specifically, the plaintiff alleged that she had had a good working relationship with her supervisor until she refused a sexual advance. Id. Thereafter, her supervisor continually harassed and humiliated her. Id.

The district court framed the issue as "whether the retaliatory actions of a male supervisor, taken because a female employee declined sexual advances, constitute[d] sex discrimination within the parameters of Title VII. . . ." Id. The court concluded that since the conduct of the supervisor created an artificial barrier to employment, the plaintiff made out

four years after the 1972 amendments to the Civil Rights Act of 1964. Moreover, although *Williams* may have marked a turning point for sexual harassment law, many courts continued interpreting Title VII in their customary manner since *Williams* was not binding precedent.[10]

The diversity in judicial construction of Title VII prompted the Equal Employment Opportunity Commission ("EEOC")[11] in 1980 to develop guidelines for analyzing sexual harassment claims.[12] The EEOC guidelines were important in two respects. First, the guidelines affirmed the position that sexual harassment in employment violated Title VII.[13] Secondly, the guidelines not only defined sexual harassment in traditional terms, as any conduct which deprived an individual of tangible economic benefits for its failure to succumb to sexual advances, it also indicated, for the first time, that sexual harassment included any conduct of a sexual nature that created a hostile or offensive working condition.[14] Accordingly,

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a cause of action under Title VII. Id at 657-58. The court reasoned, in rejecting the defendant's narrow view of the prohibition of the statute, that "Congress intended to strike at the entire spectrum of disparate treatment of men and women." Id at 658 quoting *Sprogis v United Air Lines, Inc.*, 444 F2d 1194, 1198 (7th Cir 1971).

10. By 1977, all federal courts faced with a sexual harassment claim agreed that, under certain circumstances, sexual harassment violated Title VII. Ralph H. Baxter, Jr. and Lynn C. Hermle, *Sexual Harassment in the Workplace* at 8 (Executive Enterprises Publication Co., Inc., 3d ed 1989). The courts differed, however, on the circumstances. For example, to find that sexual harassment was discriminating treatment within the meaning of Title VII, most courts required that the plaintiff show the loss of a tangible employment benefit. See, for example, *Fisher v Flynn*, 598 F2d 663, 665 (1st Cir 1979); *Heelan v Johns-Manville Corp.*, 451 F Supp 1382, 1388 (D Colo 1978); and *Munford v James T. Barnes & Co.*, 441 F Supp 459, 465-66 (ED Mich 1977). Other courts required that the plaintiff show that the alleged sexual conduct was an employer-approved practice. See, for example, *Garber v Saxon Business Prods.*, 552 F2d 1032 (4th Cir 1977).

11. The Equal Employment Opportunity Commission is an agency created by the 1964 Civil Rights Act for the purpose of promoting action programs that would effectuate equal employment opportunities. 42 USC § 2000e-4, §§ 12111, 12117.

12. These EEOC guidelines were originally enacted on November 10, 1980, at 45 Fed Reg 74677 (1980).

13. 29 CFR § 1604.11 (1991).

14. 29 CFR § 1604.11. 29 CFR § 1604.11(a) expressly provides:

> § 1604.11. SEXUAL HARASSMENT.
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> (a) Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 CFR § 1604.11.

the guidelines encouraged judicial recognition of the hostile environment sexual harassment claim.

Although the EEOC guidelines articulated the concept of "hostile environment" sexual harassment, because the commission was only an administrative agency, whose promulgations did not have the force of law, some courts were initially unwilling to recognize a hostile environment claim.[15] Not until six years after the EEOC guidelines were promulgated did the United States Supreme Court finally end the debate over whether a hostile environment sexual harassment claim was actionable under Title VII.

The Supreme Court decided the landmark case of *Meritor Savings Bank v Vinson* on June 19, 1986.[16] In *Meritor*, the female-plaintiff, a bank-teller who had advanced to branch manager, brought a sexual harassment claim under Title VII. The plaintiff testified that she had had a sexual relationship with the vice president of the defendant-bank because she feared losing her job.[17] Thereafter, the plaintiff alleged that the vice president began making repeated demands for sexual favors at the office, both during and after business hours, fondled her in front of other employees, followed her into the women's restroom when she entered alone, and exposed himself to her.[18] The vice president denied the female-plaintiff's allegations of sexual activity.[19] Without resolving the conflicting testimony, the district court found that absent an

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15. Although most courts acknowledged the viability of a hostile environment sexual harassment cause of action, some courts rejected the hostile environment theory outright or through omission. Conte, *Sexual Harassment in the Workplace: Law and Practice* § 2.13 at 42-43 (cited in note 3). For example, some courts merely omitted instructing or addressing elements of a hostile environment sexual harassment claim. See *Meyers v ITT Diversified Credit Corp.*, 527 F Supp 1064 (ED Mo 1981) (The court's conclusions of law only addressed elements of quid pro quo harassment even though, prior to termination, the plaintiff had been moved to a back room, placed on a different time schedule to facilitate her presence in the office after the other employees had left the building and, thereafter, subjected to numerous uninvited instances where her superior placed his hands on her shoulders and thighs).

16. 477 US 57 (1986). The *Meritor* decision is usually described as a "landmark" case because it marked the first time that the Supreme Court had ruled on the viability of a legal cause of action for sexual harassment under Title VII. However, as discussed previously in this comment, the lower federal courts had, since *Williams v Saxbe* in 1976, been finding that quid pro quo sexual harassment was punishable under Title VII. Furthermore, hostile environment sexual harassment claims were first judicially recognized as a violation under Title VII in *Bundy v Jackson*, 641 F2d 934 (DC Cir 1981).

17. *Meritor*, 477 US at 60. The female-plaintiff had initially refused the vice president's advances but eventually acquiesced. Id.

18. Id.

19. Id at 61.

economic effect, a sexual harassment claim would not lie.[20]

On appeal to the United States Supreme Court, the defendant-bank argued that Title VII, in prohibiting discrimination with respect to "compensation, terms, conditions, or privileges" of employment, was only concerned with "tangible loss" of "an economic character," and not "purely psychological aspects of the workplace environment."[21] The Supreme Court rejected the defendant's argument and held that the claim of "hostile environment" sexual harassment was a form of sexual discrimination that was actionable under Title VII.[22] The Court based its holding upon two rationales. First, the Court reasoned that the language of Title VII was not limited to "economic" or "tangible" discrimination; rather, Congress' intent with the Act was "to strike at the entire spectrum of disparate treatment of men and women" in employment.[23] Second, the Court opined that the EEOC guidelines, which drew upon a substantial body of judicial decisions, afforded employees the right to work in an environment free of intimidation, ridicule, and insult.[24]

Although the *Meritor* decision ended all debate whether hostile environment sexual harassment was proscribed by Title VII, the decision failed to address the disagreement between the circuit courts in defining hostile environment sexual harassment claims—specifically, what precise conduct would create a sexually hostile environment?

The EEOC guidelines offered little guidance in this area. The guidelines stated only that in determining whether alleged conduct constituted sexual harassment, the legality of any conduct should be made on a case by case basis.[25] The guidelines further stated

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20. Id.

21. Id at 64 citing Brief for Petitioner 30-31, 34.

22. *Meritor*, 477 US at 65.

23. Id at 64 quoting *Los Angeles Dept. of Water and Power v Manhart*, 435 US 702, 707 (1978).

24. *Meritor*, 477 US at 65. The Court, although noting that the EEOC guidelines were not binding on the courts by reason of their authority, gave credibility to the guidelines by stating that "courts and litigants may resort [to them] for guidance." Id. As a result, today the EEOC guidelines are given considerable weight as authority. The relevant sections of the EEOC guidelines are cited in note 14.

25. 29 CFR § 1604.11(b). 29 CFR §1604.11(b) expressly provides:

> (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

29 CFR § 1604.11(b).

that the determination was to be made by looking at the "totality of the circumstances" of the nature and context in which the alleged conduct occurred.[26]

Judicially, the courts after *Meritor* agreed that hostile environment sexual harassment existed when an employee was subjected to unwelcome sexual advances, requests for sexual favors or other conduct of a sexual nature that was sufficiently severe, pervasive, or unreasonable so as to alter the conditions of the victims' employment and create an abusive working environment.[27] No standards or definitions emerged in the courts, however, to explain or define the contours of "severe," "pervasive," or "unreasonable" conduct. The result was inconsistency in the decisions of the courts. For example, in some cases the courts found lewd comments, inquiries, and jokes, the use of sexual epithets, and/or the prominent display of pornographic materials to constitute sexual harassment.[28] By contrast, other courts confronted with the same conduct ruled that such actions did not constitute sexual harassment.[29] More specifically, some courts found that sexual touching was actionable,[30] while other courts did not.[31] If any consistency

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For more text on 29 CFR § 1604.11, see note 14 and accompanying text.

26. Id.

27. *Jordan v Clark*, 847 F2d 1368, 1373 (9th Cir 1988). See also *Jones v Flagship Int'l.*, 793 F2d 714 (5th Cir 1986); *Scott v Sears, Roebuck & Co.*, 798 F2d 210 (7th Cir 1986).

Today, many circuit courts have separated the requisite elements of a hostile environment sexual harassment claim into precise components. The Third Circuit, for example, requires that "five constituents must converge to bring a successful claim for a sexually hostile work environment under Title VII: (1) the employees suffered intentional discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability." *Andrews v City of Philadelphia*, 895 F2d 1469, 1482 (3d Cir 1990).

28. See, for example, *Coley v Conrail*, 561 F Supp 645 (ED Mich 1982) (The court found the supervisor's constant sexually explicit and demeaning remarks pertaining the plaintiff's menstrual cycle and the size of her breasts to be sufficiently severe and persistent to constitute sexual harassment). See also *Zabkowicz v West Bend Co.*, 589 F Supp 780 (ED Wisc 1984) (Male co-workers inquiries about whether the plaintiff was wearing a bra, calling her "slut" and "cunt", and posting, over a three year period, approximately 75 sexually provocative drawings referring to the plaintiff in disparaging terms was more than merely unreasonable).

29. See *Rabidue v Osceola Refining Co.*, 805 F2d 611 (6th Cir 1986) (where the workplace contained posters of naked and partially dressed women and male co-workers and supervisors customarily called the plaintiff "whore," "cunt" and other vulgarisms the conduct did not qualify as severe conduct).

30. See, for example, *Martin v Norbar, Inc.*, 537 F Supp 1260 (SD Ohio 1982) (Employer's motion for summary judgment was denied where co-workers made lewd comments, sexual advances and touched the plaintiffs legs and thighs on several occasions).

31. See *Highlander v KFC Natl. Management Co.*, 805 F2d 644 (6th Cir 1986) (The

did exist in the courts' decisions, it rested on the fact that few plaintiff's prevailed under a hostile environment sexual harassment theory.

The courts' failure to effectively adjudicate hostile environment type claims may have resulted from a variety of reasons. First, the courts' ineffectiveness may be self-imposed. As mentioned previously, the courts have done little if anything to explain, expound, develop or define the evolving principles of this relatively new area in the law. For instance, courts still have not sufficiently expounded on the meaning of "severe," "pervasive," or "unreasonable" conduct. Second, the courts' ineffectiveness may result from their inability or unwillingness to understand, on a more fundamental level, the underlying aspects and problems of the sexual harassment claim itself.

The failure of some courts to adequately understand and address the hostile environment claim can best be exemplified by *Highlander v KFC Natl. Management Co.*.[32] In *Highlander*, the plaintiff, a female, alleged that a male co-worker approached her and another female employee and made comments about their "chic" uniforms.[33] The plaintiff claimed that the male co-worker then began touching the females' legs and buttocks to see if they were wearing "Underalls" and also touched the plaintiff's nametag which was displayed over her breast.[34] The plaintiff informed the co-manager of the incident but did not file a report because she "did not want to make a big stink about it."[35] The plaintiff also alleged that a week or so later a manager, who had conducted an investigation into the prior incident, told her that if she wanted to become a co-manager "there was a motel across the street."[36] Finally, the plaintiff alleged that she was constantly subjected to crude conversation from co-workers.[37] The district court held for the defendant.

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court held that one instance of fondling the plaintiff's breasts and buttocks and one verbal proposition by two different managers were not sufficient to establish a hostile environment). See also *Scott v Sears Roebuck & Co.*, 798 F2d 210 (7th Cir 1986), and *Walter v KFGO Radio*, 518 F Supp 1309 (D ND 1981).

32. 805 F2d 644 (6th Cir 1986).

33. *Highlander*, 805 F2d at 646.

34. Id.

35. Id. After an investigation was conducted by another manager, the plaintiff also stated in an interview with this manager, that she did not desire to make an issue out of the whole matter because she did not "think it was that big a deal." Id.

36. Id.

37. Id at 650.

The Sixth Circuit Court of Appeals affirmed the district court's judgment for the defendant and held, inter alia, that the plaintiff had failed to carry her burden of proof that she had been exposed to hostile environment sexual harassment.[38] In support of this holding, the court pointed to the plaintiff's attitude that she "didn't think it [the incident] was that big of a deal" and her failure to file immediate reports because she did not want to raise "a big stink about it."[39]

The result in *Highlander* emanates, as one writer suggests, from the failure of the judiciary to consider and attempt to understand the female-plaintiff's perspective of sexual harassment.[40] This author agrees and, therefore, contends that the courts should adopt a method of adjudicating hostile environment sexual harassment claims that would take into account the females' perspective.[41]

III. The Need for Change?

Professor Kathryn Abrams, in her insightful 1989 Vanderbilt Law Review article entitled *Gender Discrimination and the Transformation of Workplace Norms*,[42] urged that the courts adopt an adjudicative approach to sexual harassment claims that would consider the female-plaintiff's perspective. Professor

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38. Id.

39. Id at 650.

40. See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand L Rev 1183 (1989). For a discussion of the Abrams' article see notes 42-47 and accompanying text.

41. This author believes that the use of a reasonable woman standard would only serve its purpose in the adjudication of a hostile environment sexual harassment claim (and not a quid pro quo sexual harassment claim). The "critical link" of the hostile environment claim, as Catherine MacKinnon aptly stated, "is the relationship of sexuality that society attached to gender." Catherine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, 174 (Yale University Press, 1979). The underlying theory posits that there is a sexual power asymmetry between men and women. Id. This theory also suggests that "women's sexuality define women as women" but men's sexuality do not define men as men. Id. Therefore, whether the crucial element of proving a hostile environment harassment claim is met— that is, whether conduct is sufficiently severe or pervasive so as to alter the conditions of the victim's employment and create an abusive working environment— inherently depends on whether the element is considered from the perspective of the reasonable woman or reasonable man.

Conversely, under quid pro quo harassment, the essential element to be proved—a tangible job loss or gain resulting from refusal or submission to unwelcome sexual advances—does not depend on the perspective in which it is viewed. Furthermore, a successful quid pro quo claim does not depend on whether conduct is deemed "pervasive" or "severe." Conversely, a single event may be sufficient to prove quid pro quo sexual harassment claim.

42. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand L Rev 1183 (1989).

Abrams enunciated the importance of rethinking sexual harassment from the woman's point of view for the simple reason that "men regard conduct [in the workplace], ranging from sexual demands to sexual innuendos, differently than women do."[43] This difference, Professor Abrams explained, results from at least two factors. First, since women are relative newcomers to many types of work and, therefore, often occupy the entry-level positions of an occupation, many women suffer from feelings of low self-esteem or inferiority.[44] Consequently, sexual advances or innuendos may be construed by women as judgments about their ability to succeed.[45] Secondly, because women, in general, have greater physical vulnerability and have been raised in a society where rape and sexual assaults have reached unprecedented levels, many women may have good cause to be wary of sexual encounters.[46] Abrams contended, therefore, that these two factors must be understood and accounted for before the courts can effectively adjudicate sexual harassment claims. Consequently, she proposed a "revised approach" that would emphasize the victim's perspective— that of a reasonable woman.[47]

IV. The Reasonable Woman Standard

Citing the Abrams article, the reasonable woman standard was first explicitly espoused and adopted by the Ninth Circuit court of Appeals in *Ellison v Brady*.[48] In *Ellison*, the plaintiff, a female,

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43. Abrams, 42 Vand L Rev at 1202 (cited in note 42).

44. Id at 1204. Professor Abrams contends also that perhaps it is simply not the womens' comparatively recent entry into the professions which make many women feel like newcomers, but rather their lack of control over important decisions and workplace norms. Id at 1204 n 89.

45. Id at 1205.

46. Id at 1205. A woman's wariness of sexual encounters, Professor Abrams asserts, might also correspond to the rapid rise of the pornography industry, which has created continuous images of sexual coercion and violence. Id.

47. Id at 1191-93 (cited in note 42).

48. 924 F2d 872 (9th Cir 1991). The reasonable woman standard was first espoused in the *Rabidue* dissent by Judge Keith. *Rabidue v Osceola Refining Co.*, 805 F2d 611, 623-28 (6th Cir 1986). In his dissent, Judge Keith criticized the majority's finding that the lewd comments and posters of nude and semi-clad women did not create a hostile working environment since "the overall circumstances of the plaintiff's workplace evince[d] an anti-female environment". *Rabidue*, 805 F2d at 623. In criticizing the majority's conclusion, he disagreed with the court's holding that, in considering hostile environment claims, the courts should adopt the perspective of the reasonable person's reaction to a similar environment. The judge opined, "the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men." Id at 626. Moreover, the judge concluded, unless a reasonable woman standard is adopted,

brought a sexual harassment action under Title VII against a male co-worker.[49] For months, the male co-worker had written the plaintiff numerous bizarre love letters, pestered her with unnecessary questions, and hung around her desk requesting lunch dates.[50] The district court granted the government's motion for summary judgment on the ground that Ellison had failed to state a prima facia case of hostile environment sexual harassment.[51]

On appeal, the appellate court formulated the issue as "what test should be applied to determine whether conduct is sufficiently severe or pervasive to alter the [working] condition. . .?"[52] The court ultimately reversed the district court and held that "a female plaintiff states a prima facia case of hostile environment sexual harassment when she alleges conduct which a *reasonable woman* would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[53] In so holding, the court stated that it adopted the reasonable woman standard because it believed that "[A] sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[54] Such a gender-conscious standard, the court concluded, would not establish a higher level of protection for women than men, but rather, would enable women "to participate in the workplace on an equal footing with men."[55]

Presently, no other circuit court has adopted an explicit reasonable woman standard as articulated by the Ninth Circuit; that being, the explicit standard which *constructively* considers the per-

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"the defendants as well as the courts [will be] permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men." Id.

49. *Ellison*, 924 F2d at 873.

50. Id at 873-74. One love letter, dated October 22, 1986, read:

> I cried over you last night and I'm totally drained today. I have never been in such constant term oil (sic). Thank you for talking with me. I could not stand to feel your hatred for another day. Id at 874.

Another letter read:

> I know that you are worth knowing with or without sex. . . . Leaving aside the hassles and disasters of recent weeks. I have enjoyed you from O so far away. Admiring your style and elan. . . . Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks . . . I will [write] another letter in the near future.

Id.

51. Id at 875.

52. Id at 873.

53. Id at 879 (emphasis added).

54. Id.

55. Id.

spective of the female-victim in the adjudication of hostile environment sexual harassment claims. Although most courts continue applying a reasonable person standard by comparing the reaction of the plaintiff to the perspective of the hypothetical reasonable person,[56] some courts have replaced the hypothetical "reasonable person" with the hypothetical "reasonable person of the characterized individual."[57] These courts, however, separate or delineate the reasonable person and the reasonable person of the characterized individual only linguistically and cursorily without explaining the semantic difference, if any, between the standards or the perspectives of the two.[58] This approach demonstrates the

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56. Currently, the First, Second, Fourth, Fifth, Seventh, Eighth and probably the Sixth Circuit apply a traditional reasonable person standard to adjudicate hostile environment sexual harassment claims:

First Circuit: See *Morgan v Massachusetts General Hospital*, 901 F2d 186 (1st Cir 1990) (The district court did not err in determining that the conduct was not of the type that would interfere with a *reasonable person's* work performance, nor would it seriously affect a *reasonable person's* psychological well-being to the extent required by Title VII).

Second Circuit: See *Trotta v Mobile Oil Corporation*, 788 F Supp 1336 (SD NY 1992) (In determining whether the conduct in question violates Title VII, the conduct must be viewed from the standard of a *reasonable person*).

Fourth Circuit: See *Paroline v Unisys Corp.*, 879 F2d 100 (4th Cir 1989), superseded and vacated in part on rehearing in *Paroline v Unisys Corp.*, 900 F2d 27 (4th Cir 1990) (Plaintiff raised a genuine issue as to whether unwelcome touching and sexual innuendo would significantly affect the psychological well-being or the job performance of a *reasonable person* in like circumstances).

Sixth Circuit: For a discussion of the standard employed by the Sixth Circuit to adjudicate hostile environment sexual harassment claims, see the discussion of *Rabidue* (cited in note 29) and *Highlander* (cited in note 32) in notes 57-58.

Seventh Circuit: See *Daniels v Essex Group, Inc.*, 937 F2d 1264 (7th Cir 1991) (When evaluating a Title VII sexual or racial harassment claim, the court must consider, inter alia, the likely effect of a defendant's conduct upon a *reasonable person's* ability to perform his or her work and upon his or her well-being).

Eighth Circuit: See *Burns v McGregor Electronic Industries, Inc.*, 955 F2d 559 (8th Cir 1992) (On remand, the district court must consider whether a *reasonable person* would consider the conduct of the defendants to be sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment).

57. When the Sixth Circuit Court of Appeals decided *Rabidue* on November 13, 1986, the court stated that when judging the circumstances which give rise to a hostile environment sexual harassment claim, the court "must adopt the perspective of a *reasonable person's* reaction to a similar environment." *Rabidue*, 805 F2d at 620 (cited in note 29). Only five days later, however, that same court, in deciding *Highlander*, focused not only on the "perspective of a *reasonable person's* reaction to a similar environment" but also looked to determine if, under this perspective, "the defendant's conduct . . . would have seriously affected the psychological well-being *of that characterized individual.*" *Highlander*, 805 F2d at 650 (emphasis added) (cited in note 32).

58. Whether the court in *Highlander* intended to modify the *Rabidue* standard is arguable. Looking at the language employed by the Sixth Circuit in both decisions, an argument could be made, at least from a semantics standpoint, that the court in *Highlander* by further defining the standard it had set in *Rabidue*, had moved toward an implicit reasona-

courts' lack of understanding of the sexual harassment claim. The reasonable person standard assumes males and females alike share the same view of sexual harassment. Replacing the reasonable person with the reasonable person of that characterized individual without differentiating the views and setting apart the standards shows less of an effort to see beyond the male-biased perspective of the reasonable person than an attempt to merge or approximate the two views and standards.

Nevertheless, within the past few years, there have been a few circuit courts which have adopted *implicit* reasonable woman standards to adjudicate hostile environment sexual harassment claims.[59] Under these approaches, the courts analyze the plaintiff's perspective subjectively and objectively. Generally, under the objective element, the perspective of a reasonable person of the same sex is scrutinized. Therefore, when the plaintiff is female (which is generally the case), the perspective of the reasonable woman is examined. For example, the United States District Court for the Middle District of Florida used such a standard in *Robinson v Jacksonville Shipyards, Inc.*[60]

In *Robinson*, the plaintiff, a female, commenced an action pursuant to Title VII asserting that the defendants created and encouraged a sexually hostile, intimidating work environment.[61] In this non-jury action, the plaintiff presented an abundant amount of photographs and documentary evidence which evidenced: (1)

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ble woman standard. That is to say where the plaintiff was a female, the perspective of a reasonable person of that characterized individual would be a reasonable woman.

Unfortunately, however, the *Highlander* court did not indicate that it was modifying, changing, or replacing the reasonable person standard it had defined in *Rabidue*. Nor did it indicate that there was any difference in the standards or perspectives as stated. Furthermore, no Sixth Circuit decision since *Highlander* has mentioned the linguistical differences of *Rabidue* and *Highlander*. Further still, almost all Sixth Circuit decisions since *Highlander* cite *Rabidue* as precedent. The logical conclusions, therefore, are: One, the Sixth Circuit Court of Appeals probably did not intend to modify or change the reasonable person standard established in *Rabidue*, and; two, the Sixth Circuit, today, continues to adhere to a traditional reasonable person standard to adjudicate hostile environment sexual harassment claims.

59. Currently, the Third Circuit and the Eleventh Circuit apply an implicit reasonable woman standard to adjudicate hostile environment sexual harassment claims:

Third Circuit: See *Andrews v City of Philadelphia*, 895 F2d 1469 (3d Cir 1990) (On remand, the trial judge should look at all of the incidents to see if they produce a work environment hostile and offensive to women of reasonable sensibilities).

Eleventh Circuit: See *Robinson* (cited in note 60). For a discussion of *Robinson* see notes 60-69 and accompanying text.

60. 760 F Supp 1486 (MD Fla 1991).

61. *Robinson*, 760 F Supp at 1490.

the confirmation of the presence of pictures in the workplace of undressed women, and (2) the verification of remarks made by male co-workers and supervisors which demeaned women.[62] The plaintiff also presented two female expert witnesses.

One expert, whose specialty was on common patterns and responses to sexual harassment, testified that men and women perceive the existence of sexual harassment differently.[63] In the court's opinion, this expert's testimony provided a sound explanation for the contradictory testimony of the defendant's male expert witnesses pertaining to the alleged harassing behavior as well as the working conditions at Jacksonville Shipyards, Inc. (JSI).[64] Accordingly, based on this evidence, the court found that the defendants had violated Title VII by maintaining a sexually hostile working environment.[65]

In so holding, the court opined, inter alia, that the plaintiff was required to prove the harassment complained of affected the conditions of her employment.[66] This requirement, the court stated, must be tested both subjectively and objectively.[67] Regarding the former, the court declared that the question was whether the plaintiff had shown that she had been an affected individual. Regarding the latter (the objective standard), the test was whether a person of the plaintiff's sex - a reasonable woman - would perceive

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62. Id at 1490-91. Robinson testified that innumerable pictures of nude and partially nude women appeared throughout the JSI workplace in the form of magazines, plaques, photographs and calendars. Id at 1493. She also testified about comments of a sexual nature which she recalled hearing from co-workers. Id. Remarks recalled by Robinson included: "I'd like to have some of that;" "come sit on my lap;" and "the more you lick it, the harder it gets." Id at 1498.

63. Id at 1507. The other expert, who specialized in sexual stereotyping, testified that studies showed that stimuli of nude photographs and sexually explicit language in the workplace encouraged a significant number of the male population in the workforce to view women as sex objects. Id at 1503. The study showed, for instance, that when profanity was tolerated in the workplace, women were three times more likely to be treated as sex objects than in a workplace where profanity was not tolerated. Id at 1504. Furthermore, when sexual joking was prevalent in the work environment, treating women as sex objects were three to seven times more likely to occur. Id at 1505.

64. Id at 1507. One of the defendant's male expert witnesses had testified that the visual materials in the JSI workplace, in his opinion, did not create a serious or probable harm to the average woman. Id at 1508. He also testified that these materials do not promote sexual aggression by men or induce calloused attitudes toward women. Id.

Another of the defendant's male expert witnesses testified that, in his opinion, the average woman would not be substantially negatively affected by the materials. Id at 1509.

65. Id at 1491.

66. Id at 1522.

67. Id at 1524.

the plaintiff's workplace to be an abusive working environment.[68] Thereafter, the court concluded that not only did the evidence show that Robinson became greatly upset when confronted with the episodes of harassment, but also that a reasonable woman would have found the working environment at JSI to have been abusive.[69]

Notwithstanding the explicit reasonable woman standard, the implicit reasonable woman standards can also be useful in effectively adjudicating hostile environment sexual harassment claims, since they not only consider the perspective of the reasonable woman, but also elicit testimony that men regard sexual conduct in the workplace differently than women do.

V. Viability of the Reasonable Woman Standard

Undoubtedly there are several potential problems with adopting the explicit reasonable woman standard. The first and most obvious possible problem with the explicit reasonable woman standard is that it may not meet the needs of everyone who seek recourse from sexual harassment under Title VII. As Justice Stevens dissented in *Ellison*, since Title VII was "designed to achieve a balanced and generally gender neutral and harmonious workplace" it must come to the aid of all potential victims of sexual harassment in the workplace.[70] The fact that women may be the most frequent targets of sexual harassment, Justice Stevens stated, did not necessarily mean that they were the only targets.[71] Justice Stevens, therefore, advocated a gender neutral standard such as the reasonable "victim," "target," or "person."[72]

This writer contends, however, that adopting the explicit reasonable woman standard does not preclude the courts from using the appropriate victim's perspective— that of a reasonable man— where a male employee brings an action alleging that his co-workers or supervisors have engaged in conduct which created a hostile working environment. Nevertheless, the adoption of the explicit reasonable woman standard is appropriate given the statistical reality of sexual harassment claims being brought predominantly, if not almost exclusively, by women.

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68. Id.
69. Id.
70. *Ellison*, 924 F2d at 884 (cited in note 48).
71. Id.
72. Id.

Another problem with the explicit or implicit reasonable woman standard might be its applicability. For instance, asking judges and jurors, many of whom are men, to apply a reasonable woman standard might be unfeasible because it would theoretically require a man to see with and/or through the eyes of a woman. Although the male judge or juror and the female victim would perceive the same conduct or occurrences, the man's experiences may prevent him from properly "seeing" the events and circumstances from the woman's perception, viewpoint, or experience. This problem can be best exemplified and understood given the finding testified to by an expert in the field of psychology in the *Robinson* decision.[73] This finding revealed almost "flip-flop attitudes" when both men and women were asked what their response would be to being sexually approached in the workplace.[74] Approximately two-thirds of the men said that they would be flattered and only fifteen percent said they would feel insulted.[75] For the women, the proportions were reversed.[76]

Admittedly, if examined theoretically, the applicability of a reasonable woman standard is questionable. Because of differences of opinion between men and women as to what constitutes hostile environment sexual harassment, a male judge or juror may not be able to accurately assess the perspective of the reasonable woman. From the more important practical standpoint, however, this author believes that applying the reasonable woman standard would necessarily be preferable to using a result under a male-biased "gender neutral" standard. Applying the reasonable woman standard, at the least, forces a male judge or juror to examine or address the hypothetical reasonable woman's perspective, view, or experience. Consideration of the female-plaintiff's perspective, as already stated, is an essential aspect to effectively adjudicating sexual harassment claims. Therefore, any attempt by a male of assessing the perspective of a reasonable woman under the reasonable woman standard would necessarily lead to a better result than using a gender neutral standard which ignores the experiences and perspectives of women.

Finally, another potential problem with the employment of the explicit or implicit reasonable woman standard is that it may permit a cause of action to arise out of a well-intentioned compliment.

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73. See notes 60-69 and the accompanying text for a discussion of *Robinson*.
74. *Robinson*, 760 F Supp at 1505 (cited in note 60).
75. Id.
76. Id.

It could be argued that because a reasonable woman standard examines primarily the female-victim's perspective, a well-intentioned compliment on the part of a male employee may be interpreted by the female employee as a sexual remark or advance and, therefore, form the basis of a cause of action for sexual harassment.

Undoubtedly, under the explicit or implicit reasonable woman standard, there may be an occasion where certain conduct, such as compliments, can be classified as unlawful sexual harassment even though the harasser did not intend or realize that his conduct was creating a hostile environment. This author believes, however, that such a scenario is highly unlikely. Mere traditional compliments would have to be very "pervasive" in order to create a hostile working environment. Furthermore, if a "traditional compliment" were that pervasive, it might be questionable whether or not the compliment was ever really well-intentioned.

VI. Conclusion

Considering the inability of the courts to effectively adjudicate sexual harassment claims, the decision of the Ninth Circuit Court of Appeals to espouse the explicit reasonable woman standard, as well as other courts' decisions to adopt implicit reasonable woman standards, should assist women in their quest for equality and acceptance in the workplace. The reasonable woman standard is only an attempt by these courts to address the fundamental problem of adjudicating a sexual harassment claim. The rudimentary problem, as stated before, is that men regard sexual conduct in the workplace differently than women do. The "gender neutral" reasonable person standard tends to be male-biased and the perspective of the woman is lost. Therefore, if the reasonable woman standard only succeeds in forcing the courts and litigants to address the perspective and/or experience of the female-victim, the standard should be a success and an achievement in the women's struggle for equality in the workplace. Furthermore, given this possibility, reason for its adoption and continued application far outweigh any arguments for its elimination.

Nevertheless, as with any relatively innovative standard, the viability of the reasonable woman standard will be tested. In the long run, to be successful the reasonable woman standard will have to be adaptable to the changes in the views of the reasonable woman. Hopefully, with the assistance of education and strongly enforced anti-harassment employment policies, the reasonable woman stan-

dard will help bridge the gap in perception, between men and women, so that one day both will know what conduct offends the reasonable person of the opposite sex. For now, if the reasonable woman standard at least draws the males' attention to the perspectives of a woman who must endure workplace harassment, the standard will be a small but progressive step in the women's struggle to rid the workplace of sexual harassment and stabilize themselves in the workplace on equal-footing.

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